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2 1 18**'Material contribution' after *Williams v The Bermuda Hospitals Board*****S H Bailey, Professor of Public Law, University of Nottingham***

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1. INTRODUCTION

In *Bonnington Castings Ltd v Wardlaw*¹ Lord Reid in the House of Lords said this:²

'It would seem obvious in principle that a pursuer or plaintiff must prove not only negligence or breach of duty but also that such fault caused or materially contributed to his injury, and there is ample authority for that proposition both in Scotland and in England.'

This rule was applicable to cases of breach of statutory duty as well as negligence and the matter had to be proved on the balance of probabilities. The reference to

¹ [1956] AC 613.

² At 620.

the concept of a 'material contribution' has led to great difficulty in English law, although not for quite a time after the decision in *Bonnington Castings* itself. The difficulties have arisen most commonly in practice in cases concerning clinical negligence or industrial diseases, although they are not confined to those classes of case. The main issues include the following: Is there on the authorities, as a matter of binding precedent, a 'material contribution rule' separate and distinct from the normal rule in negligence that the claimant must prove as one of the elements of the cause of action that the defendant's wrong was a but-for cause of the claimant's damage?; if there is such a rule, what is its justification and what are the parameters?; might there be a number of distinct 'material contribution' rules?³ The Court of Appeal in *Bailey v Ministry of Defence*⁴ stated that there was indeed a 'material contribution rule' that operated as a 'modification' to the requirement to prove but-for causation. This was then accepted as good law in a number of cases, mostly in the context of clinical negligence or industrial disease, although actually applied in only a few.⁵ The status of *Bailey* was reviewed by the Privy Council in *Williams v The Bermuda Hospitals Board*.⁶ It was hoped that this decision would bring some clarity to the status of 'material contribution' in English law; lawyers arguing in the interests of defendants hoped, furthermore, that either it would be held that there was no 'material contribution' exception to the requirement to prove but-for causation or that any such exception would be defined narrowly.⁷ It is the purpose of the present paper to consider the authorities on this matter in the light of the decision in *Williams* and subsequent case law

³ These issues are considered in a number of recent monographs on causation in tort: S Steel, *Proof of Causation in Tort Law* (Cambridge: CUP, 2015) pp 239-248; S Green, *Causation in Negligence* (Oxford and Portland, Oregon: Hart Publishing, 2015) Ch 5; G Turton, *Evidential Uncertainty in Causation in Negligence* (Oxford and Portland, Oregon: Hart Publishing, 2016), pp 66-79.

⁴ [2008] EWCA Civ 883, [2009] 1 WLR 1052.

⁵ See below nn 72-80.

⁶ [2016] UKPC 4, [2016] AC 888.

⁷ The NHS Litigation Authority entered submissions as interveners in *Williams*, notwithstanding the case's origins in Bermuda.

In a previous article on *Bonnington Castings*⁸ the present author argued that, properly understood, the case provided no authority for any proposition that there was a 'material contribution' exception to the requirement to prove but-for causation. In the author's opinion, those arguments remain good and they will not be repeated here. The only authority that did support such a position was *Bailey*, which had been recently decided. The present article adds some further thoughts in relation to *Bonnington* and seeks to analyse the reception of *Bailey* and, ultimately, the decision in *Williams*. It argues that *Bailey* should no longer be regarded as binding authority on this point in the light of its treatment in *Williams*.

The focus in this article is on the reasoning employed in the case law in England and Scotland. This accepts that the normal test for establishing factual causation in the law of negligence is the but-for test, but acknowledges that there are exceptions. Perhaps the best-known exception is that set out in *Fairchild v Glenhaven Funeral Services Ltd*⁹ Whatever the rights and wrongs of that exception, the point made here is that it was adopted by the House of Lords deliberately and expressly as a matter of legal policy. It is submitted that the same is necessary wherever an exception to the normal rules is to be justified. There is of course a substantial literature arguing that the but-for test is inadequate as the core test for factual causation in determining liability in tort, particularly in a number of classes of case involving multiple sufficient causes.¹⁰ It

⁸ S H Bailey, 'Causation in negligence: what is a material contribution?' (2010) 30 LS 167.

⁹ [[2002] UKHL 22, [2003] 1 AC 32. Here the House of Lords held that it was just to make an exception to the normal rule in a case where the claimant developed mesothelioma as the result of exposure to asbestos dust but was unable to establish which of a number of employers who had wrongfully exposed him to such dust was responsible for the dust that actually triggered the condition.

¹⁰ The difficult cases are those of overdetermination (for example where there are multiple causes of damage each of which alone is sufficient to cause it; or where a threshold needed to produce an effect is oversubscribed) and pre-emption, where one sufficient cause prevents another sufficient cause from taking effect. See generally, Steel (n 3) Ch 1; Turton (n 3) Ch 2; J. Stapleton, 'Unnecessary Causes' (2013) 129 LQR 39.

is argued that, for example in a negligence case, instead of speculating on what would have happened instead if the defendant had been careful (that is, on something that did *not* happen), the courts should focus on what *did* happen, employing some variation of the well-known NESS test, which asks whether the factor in question was a necessary element of a sufficient set to produce the effect.¹¹ For some writers, a separate principle then provides that 'even if a defendant's breach was a cause of an injury, he is not liable to pay compensatory damages if the same injury would not have occurred in the absence of wrongful conduct'.¹² It is not the purpose of this article to address this debate. The introduction of a fundamentally different approach to establishing factual causation in the English law would need to be the subject of explicit argument before the courts. Such argument has not yet been deployed. Until then, it is appropriate to consider the case law in the terms in which it is being argued and decided.

2. USAGES OF THE LANGUAGE OF 'MATERIAL CONTRIBUTION'

The fullest consideration of the use of the language of 'material contribution' in the courts is by Steel,¹³ who notes that the existing law on material contribution is deeply confused¹⁴ and distinguishes three different purposes for which that language ('c materially contributed to e') is used. The first (termed in the present article as Variant 1) is where c is a but-for cause of e. He says that 'This usage is obfuscating. It is clearer simply to say that c satisfies the but-for test'. Secondly,

¹¹ The recent literature includes essays by Wright and Miller in R Goldberg (ed), *Perspectives on Causation* (Oxford and Portland, Oregon: Hart Publishing, 2011), Chs 14, 15. Steel and Turton, (see n 3) argue for the adoption of forms of the NESS approach. Green (n 3) argues the case for a novel approach, which she terms 'Necessary Breach Analysis'.

¹² J Stapleton, 'An "Extended But-for" test for the Causal Relation in the Law of Obligations' (2015) 35 OJLS 697, 713; Steel, (n 3) pp 42-43; J Stapleton 'Unnecessary Causes' (2013) 129 LQR 39, 54-61.

¹³ Op cit n 3 p 240. See also Steel's chapter in K Oliphant (ed), *The Law of Tort* (London: Lexis Nexis Butterworths, 3rd edn, 2015) paras 14.12 ff.

¹⁴ The same point is made by Turton (n 3), pp 65-73, writing of what she appears to regard as a single 'material contribution' rule.

(Variant 2), there are 'circumstances when *some part of e* would not have occurred without *c*, but it is difficult to determine *how much of e* would not have occurred without *c*'. That is: *c* has been a but-for cause of some part of a person's total injuries, but that part is difficult to isolate. In these circumstances, the courts have taken a liberal approach to assessing this part. This could be called the 'liberal *extent of liability* material contribution rule'. This is illustrated by *Holtby v Brigham & Cowan (Hull) Ltd.*¹⁵ Thirdly, (Variant 3), Steel suggests that there are also circumstances where 'the defendant's wrongful conduct actually played a physical role in the mechanism by which the claimant's injury came about' and *c* is found to be a cause of *e* event though the but-for test is not satisfied'¹⁶. This is illustrated by *Bailey*.¹⁷ Recent case law¹⁸ supports a fourth variant (in two forms) of 'material contribution'. This is a proposition that, possibly in limited categories of case, where *C* can prove that *D*'s negligence was a but-for cause of part of *C*'s injury, *C* can recover damages for the whole of that injury either (1) in any event; or (2) unless *D* can establish a proper basis for apportionment. This different from Variant 2 as explained by Steel. If correct, this is clearly a but-for exception. It will be argued below that Variant 4(1) is unsound¹⁹ and that both Variants are inconsistent with Court of Appeal authority.²⁰

3. 'MATERIAL CONTRIBUTION' IN THE CASE LAW PRIOR TO *WILLIAMS*

Before proceeding to an analysis of *Williams*, it is necessary to make some observations on the case law reviewed in it, in particular, *Bonnington* and *Bailey*.

¹⁵ [2000] ICR 1086. See nn 40-50.

¹⁶ This involves a variant of the NESS test. See n 11.

¹⁷ n 4. Steel (n 3) pp 244-246 is highly critical of *Bailey*. See nn 66-68.

¹⁸ See *John*, below nn 113-130.

¹⁹ See nn 124-127.

²⁰ See nn 40-50, 128-130.

(a) What did *Bonnington Castings* decide?

In *Bonnington Castings*,²¹ the pursuer, John Wardlaw, developed pneumoconiosis as the result of exposure to noxious dust at his place of work. Much if not most of this dust was in the atmosphere other than as the result of any breach of duty by the defenders; however, some of the dust was there as the result of a breach of duty in failing properly to maintain dust extraction plant fitted to swing grinders. The disease was caused by the gradual accumulation in the lungs of minute particles of silica. The House of Lords held, reversing the Court of Session on this point, that the onus of proof of causation lay throughout on the pursuer.²² They then had to determine whether the lower courts' verdict for the pursuer could still stand, and decided unanimously that it should, on the basis that the tortious dust, although probably constituting a minority of the dust in the atmosphere, had made a material contribution to the disease. What were the exact parameters of this holding as a matter of precedent has generated much debate.

The present author remains of the view²³ that the most natural interpretation of the holding is that the House of Lords regarded the combination of both sources of dust as necessary to cause the disease. Lord Reid said that the disease was 'caused by the whole of the noxious material inhaled It appears to me that the source of his disease was the dust from both sources.'²⁴ This interpretation is supported by a further consideration, not mentioned in the previous article. On the evidence in *Bonnington*, as set out in the pleadings and the printed case, Mr Wardlaw underwent x-ray examinations of his chest in 1948 and 1949 which showed no sign of pneumoconiosis. He was further examined in April 1950, was told in May 1950 that he had pneumoconiosis and on medical advice he

²¹ [1956] AC 613. See SH Bailey, *op cit* n 8; S Steel (*op cit* n 3) pp 222-224.

²² See Lord Reid's comment, above n 2.

²³ Expressed in *op cit* n 8.

²⁴ ie from hammers (non-tortious) and swing grinders (tortious).

immediately ceased work as a steel dresser.²⁵ He said that 'prior to May, 1950, when I was certified as suffering from silicosis, I hadn't had any serious illness I had enjoyed good health'.²⁶ The 'tipping point' at which there was a sufficient accumulation of dust to have the effects that led to a diagnosis of the disease had thus been reached in late 1949 or early 1950, shortly before he stopped work as a steel dresser. It should also be noted that the award of damages upheld by the House took account of Mr Wardlaw's permanent loss of earning capacity, the further development of the condition over two years following the initial diagnosis to a currently stable condition of moderate severity,²⁷ and breathlessness and fits of coughing which would circumscribe his normal social life as well as his working activities.²⁸ The interpretation of the case as involving a combination of separately insufficient causes is reinforced by Lord Keith's comment:²⁹

'Prima facie the particles inhaled are acting cumulatively, and I think the natural inference is that had it not been for the cumulative effect the pursuer would not have developed pneumoconiosis when he did and might not have developed it at all.'³⁰

Given the cumulative nature of the disease and the facts of the case the inference that had it not been for the cumulative effect of tortious and non-tortious dust Mr Wardlaw would not have developed pneumoconiosis when he did is irresistible. It is submitted that the ratio decidendi of the House of Lords decision on material contribution is that where a defendant's wrongful contribution (above de minimis) is necessary to bring about damage, the defendant is liable in full for that

²⁵ Condescence II; Pursuer's Proof p 9. The words 'early pneumoconiosis' appeared on a card dated 15 May 1950.

²⁶ Pursuer's Proof p 23.

²⁷ This disease progresses even in the absence of further exposure to noxious dust.

²⁸ Lord Wheatley, 1955 SLT 225, 232.

²⁹ [1956] AC 613, 626.

³⁰ This can be explained as follows. The onset of the disease was caused by the combination of the tortious and non-tortious dust. Had the defendants complied with their statutory duty, only the non-tortious dust would have been present. Mr Wardlaw would have continued to work and would probably developed pneumoconiosis at a later date; there was also a possibility that he might never have developed the disease (the scenario Lord Keith had in mind here is not clear (Mr Wardlaw leaving his employment for other reasons?), but it does not seem relevant).

damage. There was no problem of overdetermined causes or (material) evidential uncertainty³¹ to be solved and there were no arguments and no dicta addressed to either of those problems.³²

One of the reasons for the misinterpretation of *Bonnington Castings* is that it is commonly asserted that

'on the evidence the Claimant could not prove "but-for" causation, in the sense that it was more probable than not that if the dust extraction equipment had been working efficiently he would not have contracted the disease'.³³

This is nowhere stated as such in *Bonnington Castings* itself, and for the reasons given, is just not the case. It may be that it could not be said that he would *never* have contracted the disease, but that is not the same thing. Nevertheless, the fact that it seems to be widely believed to be true no doubt explains why some judges and commentators have come to characterise *Bonnington Castings* as an exception to but-for causation. This is commonly associated with the idea that a full award of damages had been made in a case where all C could show was that D's negligence had caused part of the injury and that this therefore constituted a special 'material contribution' rule.³⁴ This leads on to consideration of whether the damages in *Bonnington* should have been apportioned.

³¹ There was evidential uncertainty in that the *exact* respective proportions of tortious and non-tortious dust could not be identified, but that is not material as the whole of the dust was regarded as the cause, and a more-than-de minimis contribution was sufficient. Whether there would have been sufficient evidence to make a rough-and-ready apportionment under *Holtby* (nn 40-50) is a matter of conjecture.

³² By contrast, C Miller, 'Causation in personal injury after (and before) *Sienkiewicz*' (2012) 32 LS 396, 398-399 regards the *Bonnington* 'material contribution' principle as providing a solution to cases of overdetermination and for that reason is critical of the position taken in the 2010 article (n 8). It is submitted that this is an over-reading of the case. It is of course recognised that the but-for test does not produce a just outcome in some cases of overdetermination or pre-emption, certainly where there are multiple sufficient tortious causes. But these problems need to be addressed directly by analysis rather than by invocation of the expression 'material contribution'; it will always be necessary to give reasons *why* a 'contribution' should be regarded as 'material' in such a case. English law already recognises a but-for exception where there are multiple sufficient tortious causes: *Greenwich Millennium Village Ltd v Essex Services Group plc* [2014] EWHC 1099 (TCC) (an issue not raised in the CA: [2014] EWCA Civ 960).

³³ This quotation is from Cox J in *Mayne v Atlas Stone Co.* [2016] EWHC 1030 (QB), para [18].

³⁴ Variant 4, above n 18.

(c) *Bonnington Castings* and apportionment

The starting point for considering apportionment is a statement by Green:

'It is trite negligence law that, where possible, defendants should only be held liable for that part of the claimant's ultimate damage to which they can be causally linked....It is equally trite that, where a defendant has been found to have caused or contributed to an indivisible injury, she will be held fully liable for it, even though there may well have been other contributing causes.'³⁵

All turns on whether the *injury* is divisible. The fact that the *causes* of an indivisible injury can be distinguished, in a way that can rationally lead to an apportionment under the Civil Liability (Contribution) Act 1978, does not itself establish that the *injury* is divisible.³⁶

No argument as to apportionment was deployed in *Bonnington Castings*. Here, it is important to note that there are a number of aspects of apportionment to consider.

First, it might have been argued that the claim should only have been upheld insofar as the disease had been *advanced* by the tortious dust.³⁷ This is a plausible argument on the facts but, as it was not raised, no significance can properly be attached to the point that a full award of damages was upheld. This aspect would be a clear example of a divisible *injury*. (Another would be a case where C's claim against D is for the *aggravation* of an existing disease; D is only liable for the aggravation.³⁸)

³⁵ Op cit n 3 p 97. This passage was cited with approval by the Privy Council in *Williams*: see below n 93.

³⁶ This point has recently been strongly reinforced by the decision of the Court of Appeal in *BAE Systems (Operations) Ltd v Konczak* [2017] EWCA Civ 1188, where it was held that the EAT had been right to find that the claimant's psychiatric illness was not divisible; per Underhill LJ at para [71]: 'the exercise is not concerned with the divisibility of the causative contribution but with the divisibility of the harm'.

³⁷ See Hale LJ in *Hatton v Sutherland* [2002] EWCA Civ 76, [2002] ICR 613, para [42].

³⁸ Ibid.

Secondly, it was not argued that pneumoconiosis was a divisible disease in a different sense that the damages, whether full damages or damages for the acceleration, should be reduced or further reduced to reflect (broadly) the proportion of tortious dust in the atmosphere. This is a distinct aspect from first one.

It is submitted that apportionment on this basis would have been wrong in principle and is not supported by the well-known post-*Bonnington* authorities on apportionment in cumulatively-caused industrial disease cases. In these cases, apportionment was first applied in assessing damages to reflect the point that D's conduct had only become tortious after a certain date.³⁹ These were *aggravation* cases. More difficult to analyse is the decision in *Holtby v Brigham & Cowan (Hull) Ltd*⁴⁰ in upholding apportionment where different employers were responsible for wrongfully exposing the claimant to asbestos dust over different stages of the claimant's career, leading to asbestosis. Here, one of the employers, which was responsible for about half of the exposure to asbestos, was sued. The evidence suggested that that exposure alone would have been sufficient to cause asbestosis; the exposures by the other employers led to the condition being more serious.⁴¹ The Court of Appeal expressly rejected arguments (1) that if C can prove that D's conduct made a material contribution to C's disease C is entitled to recover all their loss from D, notwithstanding that others may have contributed as well; and (2) that in such a case 'the onus is upon the defendant to plead and prove that others were responsible for some and, if so, what part of the injury'.⁴² The court held, further, that the trial judge had been entitled to make a 25% reduction in the damages on the basis that the C had proved causation in respect of a quantifiable part of his disability, and the judge was 'counting the proportion

³⁹ *Thompson v Smiths Shiprepairers (North Shields) Ltd* [1984] QB 405; *Allen v British Rail Engineering Ltd* [2001] ICR 942.

⁴⁰ [2000] ICR 1086.

⁴¹ *Holtby*, at para [7].

⁴² See *Holtby*, at para [11] where the arguments are summarised. Clarke LJ dissented on the second point.

attributable to the defendant'. Indeed, the court would not have interfered with a 50% reduction.⁴³ Unfortunately, it does not appear from the report whether D's exposures preceded or followed the other tortious exposures.⁴⁴ If they followed them it would have been a straightforward aggravation case. If they preceded them, then it should have been explained why D was not liable (in addition to any subsequent tortfeasor) for the subsequent aggravation.⁴⁵ However, these matters were not reached. D's position on appeal, rejected by the court, was that no deduction at all should be made, not that a different deduction should have been made.⁴⁶ It is submitted that the only possible aspect of these cases that supports divisibility by reference to *cause* rather than *injury* is the apparent view⁴⁷ that D is liable in cumulative disease cases for the injury as it is at the end of employment with D but not for its subsequent aggravation, apart from any reliance on the law on remoteness of damage and intervening causes. As the point was not argued in the Court of Appeal in either *Holtby* or *Allen* the authority of these cases as a precedent is weak and, it is submitted, cannot stand with the approach of the Court of Appeal in *Konczak*.⁴⁸ Accordingly, it is submitted that, in *Bonnington*, both the economic losses that flowed simply from the diagnosis of pneumoconiosis, which meant that Mr Wardlaw could no longer follow his skilled occupation, and the injury itself, as no question of aggravation arose and the argument as to advancement was not raised are properly to be regarded as indivisible. However, it has been accepted obiter (but without any analysis) that apportionment *by reference to cause* would have been appropriate in *Bonnington*

⁴³ *Holtby* at paras [23], [25].

⁴⁴ Or indeed fell in between other tortious exposures or to any extent overlapped with them.

⁴⁵ It is unlikely that subsequent exposures would have been unforeseeable; it is difficult to see why they should amount to a new intervening cause. A reduction in damages on the basis that D was not liable for *subsequent* exposures was, however, expressly made by Smith J in *Allen* (n 39) but not challenged: see paras [4],[5].

⁴⁶ *Holtby*, at para.[5].

⁴⁷ Possibly arising on the facts of *Holtby*; an unchallenged finding of the trial judge in *Allen*

⁴⁸ n 36.

had the point been argued.⁴⁹ It is submitted that acceptance of this view would mean that D would *escape* liability in respect of heads of damage of which D's tort was a but-for cause and which were not too remote or the result of an intervening cause. It would be an exception to but-for causation made *against* the claimant's interests.⁵⁰ For the reasons already given, it is submitted that this view is unsound in principle. Furthermore, it has not been the subject of full argument in the case law to date.

(d) What *Bonnington* did not address

It should also be noted that there was no hint in any of the arguments or opinions in *Bonnington* that it might be sufficient to show merely that the defendant's negligence or breach of statutory duty materially increased the risk of harm,⁵¹ or was a necessary element of a set of factors sufficient to cause the harm.⁵²

(e) What did *Bailey v Ministry of Defence* decide?

The first decision⁵³ to articulate the position that a (or the) 'material contribution' principle derived from *Bonnington Castings* operates as a but-for exception was that of the Court of Appeal in *Bailey v Ministry of Defence*.⁵⁴ Here, the claimant underwent a gallstone operation at the defendant's hospital. This was unsuccessful but it was not established to have been carelessly conducted. She

⁴⁹ See eg Smith LJ in *Ministry of Defence v AB* [2010] EWCA Civ 1317, at [134]; Lord Bingham in *Fairchild* at para [14], where he referred to *Bonnington* as a case where the employer was 'potentially liable for the balance' (ie the tortious dust only).

⁵⁰ Cf the arguments that *Bonnington* involves an exception to but-for causation made in the claimants interests.

⁵¹ The test subsequently adopted in *McGhee v NCB* [1973] 1 WLR 1, HL, expressly recognised as a but-for exception in *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22, [2003] 1 AC 32, per Lord Bingham at paras [17]-[22].

⁵² Cf above n 11.. Steel (n 3) pp 243, 244, states that only an 'incautious' reading of *Bonnington* would support such an interpretation, although such a reading had been adopted in *Bailey* (see nn 66-68).

⁵³ Prior to *Bailey* there were dicta in individual opinions that indicated, or stated in terms that *Bonnington Castings* stood for a special exception to the need to prove but-for causation. See eg Lord Rodger in *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22, [2003] 1 AC 32 at [129].

⁵⁴ [2008] EWCA Civ 883, [2009] 1 WLR 1052.

became very seriously ill and was transferred to a second hospital. Here, she aspirated her vomit and in consequence suffered cardiac arrest and severe brain damage. She claimed that the incident was caused by a lack of care at the defendant's hospital immediately after the operation, which had left her in a weakened state. However, she had also developed pancreatitis after the operation, which was not claimed to be the result of a lack of care. This would also have weakened her condition. The medical evidence could not quantify the respective contribution of the lack of care and the pancreatitis to her weakened condition. At first instance, Foskett J accepted an argument that a 'material contribution' would be sufficient to establish causation even though but-for causation could not be established. He went on to hold on the facts that the lack of care and the pancreatitis 'each contributed materially to the overall weakness and it was the overall weakness that caused the aspiration'.⁵⁵ It has previously been argued⁵⁶ that this is in fact entirely consistent with a finding that but-for causation was established. Furthermore, it is crucial to note that the defendants did not seek to argue that the *totality* of the weakness at the time of the aspiration was not necessary to cause it (ie that some lesser degree of weakness would or might have been sufficient); the defendants' argument, rejected by the judge, was that the weakness resulting from lack of care was no longer operative at the time of the aspiration (ie not part of that totality). Waller LJ for the Court of Appeal held⁵⁷ that Foskett J had been entitled to find on the facts that, while but-for causation had not been established, a material contribution (to the weakness) had. His Lordship held that in cases where a claimant relied on the argument that the defendant's negligence had made a 'material contribution' to his or her harm, the but-for test was 'modified' (presumably disapplied). The key passage in Waller LJ's judgment is this:⁵⁸

⁵⁵ [2007] EWHC 2913 (QB), at para [61].

⁵⁶ S H Bailey op cit n 8 pp 183-184.

⁵⁷ [2008] EWCA Civ 883 at [31]-[34], [36].

⁵⁸ [2008] EWCA Civ 883, at [46].

' In my view one cannot draw a distinction between medical negligence cases and others. I would summarise the position in relation to cumulative cause cases as follows. [Proposition A:] If the evidence demonstrates on a balance of probabilities that the injury would have occurred as a result of the non-tortious cause or causes in any event, the Claimant will have failed to establish that the tortious causes contributed. *Hotson*⁵⁹ exemplifies such a situation. [Proposition B:] If the evidence demonstrates that "but for" the contribution of the tortious cause the injury would probably not have occurred, the Claimant will (obviously) have discharged the burden. [Proposition C:] In a case where medical science cannot establish the probability that "but for" an act of negligence the injury would not have happened but can establish that the contribution of the negligent cause was more than negligible, the "but for" test is modified, and the Claimant will succeed.'

The special *Bailey* rule appears as Proposition C.

A number of comments can be made about this passage. First, it is in terms designed to be applicable in any negligence case, not just medical negligence cases. Secondly, it applies to 'cumulative cause' cases. This category is not defined, but Waller LJ clearly regards it as applicable to cases involving cumulative causes of injury whether divisible or indivisible. *Bailey* itself falls into the latter group. Propositions A and B are clearly orthodox.

Proposition C is the crucial one. In terms, it applies where the evidential problem for the claimant arises from the limitations of 'medical science'. Presumably, the reference to 'medical' relates to the context of *Bailey* itself. But why should evidential difficulties arising from the limitations of science be treated differently from other kinds of evidential difficulty?⁶⁰ This question was not addressed. A further problem is that the expression 'the contribution of the negligent cause was more than negligible' is unclear. Does it mean that the negligent cause was shown on the balance of probabilities to be a but-for cause of part of the injury?⁶¹ The problem here is that D's negligence was a but-for cause of part of the weakness, but the ultimate injury, brain damage, was indivisible. Accordingly, it presumably meant something broader. A final difficulty is that acceptance of

⁵⁹ ie *Hotson v East Berkshire Health Authority* [1987] AC 750. Here, a doctor's misdiagnosis was held not to have caused a disability which, by the time the patient was seen by the doctor, was probably going to happen anyway.

⁶⁰ Cf criticism of such a distinction by McLachlin CJ in *Clements v Clements* 2012 SCC 22, at para [38].

⁶¹ This would fall within Variant 4 of 'material contribution': see n 18.

Proposition C seems inconsistent with the rejection of similar arguments in *Holtby*,⁶² which was not cited.

(f) Can the *Bailey* rule be derived from *Bonnington Castings*?

It is submitted that Waller LJ's Proposition C cannot properly be derived from *Bonnington Castings*.⁶³ It is not supported by the *ratio decidendi* of that case; to say (as Waller LJ does⁶⁴) that it was covered by Lord Reid's statement that a causal link could be established by an above-de minimis material contribution assumes that Lord Reid (unlike Lord Keith) did not believe it necessary to establish but-for causation. Given that, on the facts, such causation *was* established as regards the onset of the disease and no point was taken as to apportionment, this is simply implausible. A further point of distinction is that *Bonnington* concerned cumulative causes of what is today regarded as a divisible injury,⁶⁵ whereas *Bailey* concerned cumulative causes of a weakness that in turn caused an indivisible injury (brain damage).

(h) Academic reaction to *Bailey*

Academic commentary on the Court of Appeal's judgment in *Bailey* has generally been critical. It should be noted, however, that much of the analysis has been based on the entirely understandable assumption that, on the facts, (1) but-for causation was not established (given that that is what the Court of Appeal said) and (2) that it was uncertain how much weakness was necessary to cause the aspiration of vomit. For Steel,⁶⁶ the 'intuitive notion of contribution' applied here was the idea of a NESS cause and the imposition of liability in what was a case

⁶² nn 40-50.

⁶³ Steel would seem to take a similar view: op cit n 3 pp 245-246.

⁶⁴ [2008] EWCA Civ 883, at para [42].

⁶⁵ But see nn 35-50 above.

⁶⁶ Op cit n 3 at pp 244-245. See also the case notes cited at Bailey op cit n 8 at n 84. Green, by a different route, also argues that no liability should have been found in *Bailey*: op cit n 3 pp 107-109.

where it could not be proved that the defendant's breach of duty made the claimant worse off, was 'deeply radical'. The effect was 'to reverse the burden of proof on the issue of whether the injury would have happened anyway'. Steel's position is that exceptional rules under which the claimant is relieved of the requirement to prove that the relevant aspect of the defendant's conduct was a cause of his or her injury on the balance of probabilities in order to obtain compensatory damages can only be properly justified where either D has in fact wrongfully caused injury to C or C has been the victim of an injury that would not have occurred without wrongful conduct.⁶⁷ Simple uncertainty is not enough.⁶⁸ Turton⁶⁹ notes that *Bailey* added to the confusion as to the content of 'the material contribution rule'. In fact divisibility of damage was not clearly distinguished from the 'divisibility' of the exposure.⁷⁰ On the assumption that but for causation could not be established, as the pancreatitis alone might have been sufficient to cause the brain damage, a causal link to the defendant's wrong could nevertheless be established by reference to the NESS test. However, it is not clear that she regards that as sufficient to support the award of damages. She argues⁷¹ that issues of quantification are distinct from issues of causation but does not address the issue of quantification in her discussion of *Bailey*.

(i) The reception of *Bailey* in the case law

⁶⁷ Op cit n 3 pp 3-4, 5.

⁶⁸ Op cit n 3 pp 378-384. See also, to similar effect, J Stapleton, 'Unnecessary Causes' (2013) 129 LQR 39, 50-54, 57-58. Stapleton (at p 50) interprets the facts as involving overdetermination; a threshold point of physical weakness had become oversubscribed before the vomit came on the scene (cf her comment at p 57 that 'it may have been that the pancreatitis alone' would have been sufficient). However, the claimant could not show that the cardiac arrest represented 'damage', although the point had not been taken.

⁶⁹ Op cit n 3 pp 69-71, 74-75, 76-77.

⁷⁰ Stapleton 'Unnecessary causes' (2013) 129 LQR at 53 regards *Bonnington* and *Bailey* as 'quite different' for this reason.

⁷¹ Op cit (n 3) pp 24-29.

Waller LJ's dictum has been cited and considered in a large number of cases, mostly in the context of clinical negligence, but sometimes elsewhere.⁷² While counsel and the courts have generally accepted it uncritically as representing good law, in practice there has commonly been caution in its application.

The cases fall into a number of groups. First, are cases where the *Bailey* principle has been held not to apply as the medical evidence was clear,⁷³ or no question of uncertainty in medical science arose.⁷⁴ Second, there are cases where the court is satisfied that the injury would probably have occurred in any event from a non-tortious cause.⁷⁵ Third, there are cases where the court is satisfied that but-for

⁷² See eg. *Leigh v London Ambulance Service NHS Trust* [2014] EWHC 286 (QB). Here, L was accidentally trapped between seats on a bus and suffered severe pain; an ambulance was called at 19.02 and should have arrived by 19.33 but there was a negligent delay until 19.50. L developed PTSD and claimed there was a sufficient causative link between the negligent delay and the PTSD. Globe J applied *Bailey* and held D liable (and awarded £0.5m) even though but-for causation could not be established. However, he also seemed to accept the opinion of the claimant's expert that the PTSD developed 'as a consequence of one indivisible event on the bus, as to which it was the whole time that was relevant': paras [15], [18]. If so, this would make the case analogous to *Williams* and to *Bailey* as interpreted in *Williams*: see nn 93-105.

⁷³ *Aspinall v Secretary of State for Health* [2014] EWHC 1217 (QB) (injury would probably have happened anyway).

⁷⁴ *Nyang v G4S Care and Justice Services Ltd* [2013] EWHC 3946 (QB) (acts of negligence of staff responsible for at-risk detainee at immigration removal centre held not to have caused (self-inflicted) injuries to G; but-for test applied; *Bailey* not applicable as the present case was not based on 'inadequacies in the state of medical science' (para.[100])); while there had been negligence in a failure to carry out a sufficiently thorough mental health examination, there had not been time for the medication that should have been prescribed to take effect so as to prevent the incident); *Baker v Cambridgeshire and Peterborough NHS Foundation Trust* [2015] EWHC 609 (QB) (no breach of duty in failure of psychiatrist to refer B to community mental health services; but-for test, not *Bailey*, applicable to determine whether such failure caused B's suicide as limitations of medical science not relevant); *Chetwynd v Tunmore* [2016] EWHC 156 (QB) [2016] EWHC 156 (QB) (material contribution approach in disease and clinical negligence cases not to be extended to claims in negligence or nuisance between adjacent landowners). The fact that *Nyang* and *Baker* were not cumulative cause cases was not relied on.

⁷⁵ *Bailey* Proposition A. See *Mugweni v NHS London* [2012] EWCA Civ 20 (M's brain damage probably the non-negligent consequence of operation rather than tension pneumothorax (PNT) (air collecting in pleural cavity) leading to cardiac arrest; not shown that the PNT and cardiac arrest itself (which was dealt with quickly) added to the damage therefore *Bailey* material contribution rule could not apply); *King v Medical Services International Ltd* [2012] (QB); *Appleton v Medway NHS Foundation Trust* [2013] EWHC 4776 (QB) (no liability where there was negligence in treating an infection but not shown that that infection played any part in making leg amputation necessary; this was wholly caused by M's diabetes); *ST v Maidstone and Tunbridge Wells NHS Trust* [2015] EWHC 51 (QB); *Owens v Medway NHS Foundation Trust* [2015] EWHC 2363 (QB), paras [122]–[123].

causation is established.⁷⁶ Fourth, there are cases where *Bailey* Proposition C has been accepted,⁷⁷ although in most, only as a fall-back position where a finding of but-for causation has also been made.⁷⁸

Accordingly, it is only in a small number of High Court cases that *Bailey* Proposition C has been accepted as a valid basis for the award of damages where but-for causation cannot be established, and there seem to be very few indeed where it has been the basis of an actual award of damages. One of the only cases (if not the only case) where this has happened is *Canning-Kishver v Sandwell and West Birmingham Hospitals NHS Trust*.⁷⁹ Here, a neonate (born at 25 weeks gestation) in intensive care was found at 8am to be very seriously unwell with a very low heart rate. She received life-saving measures and suffered brain injury. Nursing staff were found to be negligent in failing properly to monitor and to call a doctor by, at the latest, 7am. This would have prevented the need for drastic resuscitation. It was claimed that the cardiac collapse and resuscitation measures caused or contributed to the brain injury. The defendants contended that the injury flowed from risks inevitably associated with a neonate. The judge, Sir Christopher Holland, noted that research into the potential cause or causes of such injury in a neonate was 'in its early days and ongoing', the current issues being at the 'cutting edge'. The uncertainties as demonstrated by the medical evidence 'militated against' a finding of but-for causation, but that evidence was enough for a finding that the collapse made a contribution to the

⁷⁶ *Bailey* Proposition B. See eg *Ganz v Childs* [2011] EWHC 13 (QB) (liability of GPs for negligent failure to refer patient to hospital); *Lyndon v Royal Free Hampstead NHS Trust* [2011] EWHC 2904 (QB); *Reaney v University Hospital of North Staffordshire NHS Trust* [2014] EWHC 3016 (QB), para. [71]; *Pringle v Nestor Prime* [2014] EWHC 1308 (QB); *Coakley v Rosie* [2014] EWHC 1790 (QB). *Gardner v Northampton General Hospital NHS Trust* [2014] EWHC 286 (QB) can arguably be seen as such a case in that satisfaction of the but-for test was adopted as a fall-back position.

⁷⁷ *Canning-Kishever v Sandwell and West Birmingham Hospitals NHS Trust* [2008] EWHC 2384 (QB); *Ingram v Williams* [2010] EWHC 758 (QB), paras [80]–[87] (but no breach of duty found); *Barnett v Sandwell and West Birmingham Hospitals NHS Trust* [2015] EWHC 2627 (QB), (but no breach of duty found).

⁷⁸ *Reaney*; *Coakley*, para [118]; *Pringle*; *Gardner*; *Hayes*; *Leigh*.

⁷⁹ [2008] EWHC 2384 (QB).

brain injury.⁸⁰ Even this case is not, however, unequivocal. It is possible that had the judge needed to do so a finding of but-for causation might have been made. This stands in contrast to the vast majority of cases in which judges do examine the detail of the evidence and find but-for causation established rather than the easier option of simply finding a material contribution on the basis of *Bailey* Proposition C. This follows the order of analysis in Waller LJ's dictum. However, there is also, perhaps, a judicial instinct that *Bailey* Proposition C is unorthodox and possibly unsound, and should only be reached after a view is taken on the orthodox approach. This survey suggests that *Bailey* Proposition C has rarely, if ever, been determinative. The extent to which this has in practice added substantive burdens to defendants in settling cases is not known. However, it clearly adds to the cost of litigating cases as the expert evidence has to address both causation theories.

4. THE DECISION IN *WILLIAMS v THE BERMUDA HOSPITALS BOARD*

(a) The facts

In *Williams v The Bermuda Hospitals Board*,⁸¹ the claimant was admitted to an emergency department with abdominal pains at 11.17 am. At 12.10 the emergency doctor decided to order a scan, but the actual request was not sent off until 13.10. The doctor should have asked for an *immediate* scan but negligently did not do so. The scan was performed at 17.27 and the report received at 19.30. Acute appendicitis was diagnosed and the claimant was operated on at around 21.30. It was discovered that in the meantime the appendix had ruptured and the claimant had developed serious sepsis. The sepsis caused complications ie injury to the heart and lungs. The trial judge, Hellman J,⁸² found that, had the

⁸⁰ Para [37].

⁸¹ [2016] UKPC 4, [2016] AC 888.

⁸² [2013] SC (Bda) 1 Civ

scan been asked for on an immediate basis, the operation would have taken place between 4 hrs 40 mins and 2 hrs 20 min earlier than it did. There had accordingly been a period of non-negligent delay followed by a period of negligent delay. The process of rupture and therefore the sepsis had started to develop from 15.19, which was before commencement of the period of negligent delay, and had got progressively worse with the passage of time. The judge concluded that, even if there had been a system in place for quick diagnosis, it was not established that the claimant would have been operated on before the rupture of his appendix. Accordingly, the claimant had not proved that the negligent delay caused the complications. However, the judge did award \$2,000 damages for the additional pain and suffering caused by the negligent delay. The Court of Appeal⁸³ allowed an appeal on the ground that, relying on *Bailey*, the correct test was whether the negligent delay had made a material contribution to the complications. This did not involve satisfaction of the but-for test and was clearly satisfied on the facts. The case was remitted for damages to be reassessed, leading to a total award of \$60,000. Permission to appeal to the Privy Council was also granted.

(b) The arguments

What arguments were presented to the Privy Council?⁸⁴ Counsel for the appellants (the defendants)⁸⁵ argued that orthodox rules required (1) satisfaction of the but-for test; or (2) proof that the breach materially contributed to the injury (*Bonnington Castings*). On either basis, a claimant had to prove on the balance of probabilities that the breach had caused them harm. There were two constructions of 'any rule of causation established by *Bonnington*'. The first, narrow, construction would confine it to factual circumstances directly parallel to

⁸³ [2013] CA (Bda) 2 Civ, (2014) 84 WIR 155.

⁸⁴ See [2016] AC 888, 891-897; a podcast of the oral arguments was available on the Privy Council website.

⁸⁵ Caroline Harrison QC, who appeared with Andrew Bershadski.

those in that case, ie exposure to dust from innocent and guilty sources concurrently, causing divisible disease. The second, broader, construction, adopted in innumerable cases, was that the claimant could recover damages for personal injury under this rule only where it was shown that (1) on the balance of probabilities, the breach of duty made a more than negligible contribution to the actual injury; (2) the negligent and non-negligent contributions were concurrent; (3) there was a single causative agent; and (4) there was a dose related relationship between the causative agents and the harm.⁸⁶ The injury and not merely the mechanism that led to the injury had to be divisible. *Bonnington* provided no support for a claimant recovering damages where there was evidential uncertainty and all that could be shown that careless conduct may have had a role in the outcome. Proving that the breach caused an increase in risk was insufficient unless the *Fairchild* exception applied and it clearly did not here.⁸⁷ *Bailey* was a departure from the ambit of any rule of causation contained in *Bonnington*. On the facts, the claimant could only prove that he had been caused two hours' unnecessary pain and suffering.⁸⁸ Counsel for the respondent (the claimant)⁸⁹ argued on the facts that either (1) there was sufficient evidence to establish but-for causation; or (2) it was a case where it was obvious that a 'robust, and context-sensitive approach' to but-for causation should be employed. Alternatively, the Court of Appeal in Bermuda had been correct to conclude that the plaintiff had proved a material contribution to his injury.⁹⁰ Here, counsel interpreted *Bonnington* as a rule about proof: an

⁸⁶ This is put forward as different from satisfying the but-for test but, given the reference to the injury being divisible, it is difficult to see how this is so.

⁸⁷ The claimants did not rely on *Fairchild*.

⁸⁸ In the oral submissions it was said that nobody knew how much sepsis was needed to cause the injury. This point is not adverted to by the Privy Council.

⁸⁹ Benjamin Browne QC, appearing with Luka Krsljanin.

⁹⁰ Lord Toulson at para [24] noted Mr Browne's argument that the Court of Appeal had been entitled to conclude that the overall time allowed by the judge had been too long; surgery ought to have commenced by 17.15 or at the latest 18.10. (On either basis, the period of non-negligent delay after 15.19 through which sepsis had been developing would have been shorter than the period of negligent delay). On these facts 'the Court of

inference of 'material contribution' could be drawn where it was shown that (1) the claimant had been exposed to a specific risk factor⁹¹ known to be associated with the type of damage which eventuated; (2) D's negligence increased that specific risk factor; (3) the causative agents to which the claimant was exposed operated cumulatively; and (4) there is, however, scientific uncertainty such as to make it scientifically impossible for the issue of causation to be resolved on a strict 'but-for' basis. 'The doctrine of material contribution rests on appropriately made inferences: it operates precisely where scientific evidence is so limited that the rigid "but-for" test cannot be applied.' The defendant's contention that scientific evidence must prove a contribution to the injury was overly restrictive. Furthermore, it was sufficient for the application of this approach that the causes were concurrent *in effect*; they did not have to be temporally concurrent. It would apply whether the injury was divisible or indivisible. This would 'not amount to any relaxation of the law on causation'.⁹²

(c) The decision

The Privy Council (through Lord Toulson) held that the hospital was liable, applying *Bonnington Castings*. *Bonnington* was to be interpreted as holding that the disease was caused by the totality of the toxic material inhaled and that therefore, as the question of divisibility was not raised, the tortious dust was a partial cause of the entire injury not merely a cause of part of the injury.⁹³ It had not been suggested in *Bonnington* itself that pneumoconiosis was a divisible

Appeal were entitled to infer that the greatly extended period for the development of sepsis materially contributed to the outcome.'

⁹¹ Rather than a 'single causative agent' though it seems to require a single 'factor'.

⁹² It will be noted that this provides a further version (Variant 5) of 'the material contribution rule', namely that, provided the preconditions are fulfilled, the court may draw an inference of material contribution on the facts even though science in itself cannot go that far. However, while it says *when* an inference of 'material contribution' can be drawn, it leaves the nature of that contribution (is it a but-for contribution?) obscure. The final comment suggests that it is. Counsel did not place major reliance on *Bailey*.

⁹³ See paras [31]–[34]. At para [31], Lord Toulson cited Green's observations set out above at n 35.

injury. *Bonnington* was regarded as an 'obvious parallel' to the facts of *Williams*.⁹⁴

Here, the judge found that the injury to the heart and lungs was caused by a single known agent, sepsis from the ruptured appendix.⁹⁵ The sepsis developed incrementally. It was not divided into separate components causing separate damage to the heart and lungs, but was a single continuous process that lasted longer than it should. Accordingly,⁹⁶ on the basis of the trial judge's findings that there had been a period of negligent delay of at least 2hs 20mins,⁹⁷ it was 'right to infer on the balance of probabilities that the hospital board's negligence materially contributed to the process [ie the sepsis] and therefore materially contributed to the injury to the heart and lungs'. It did not matter that in *Bonnington* the relevant exposures were simultaneous whereas here the delays were sequential; drawing such a distinction was not practicable.

What of *Bailey*? Lord Toulson⁹⁸ noted the analysis of Foskett J in *Bailey*, namely that both the weakness engendered by negligence and the weakness engendered by pancreatitis 'contributed materially to the overall weakness and it was the overall weakness that caused the aspiration.' On those findings of primary fact, Foskett J was right to hold the hospital liable. Lord Toulson added:

'As to the parallel weakness of the claimant due to her pancreatitis, the case may be seen as an example of the well known principle that a tortfeasor takes his victim as he finds her. The Board does not share the view of the Court of Appeal that the case involved a departure from the "but-for test". The judge concluded that the totality of the claimant's weakened condition caused the harm. If so, "but-for" causation was established. The fact that her vulnerability was

⁹⁴ Para [35].

⁹⁵ Para [41].

⁹⁶ Para [42].

⁹⁷ Lord Toulson at para [43] found it unnecessary to resolve the factual dispute about the length of the period of culpable delay.

⁹⁸ Paras [46]-[47]. This was obiter, given that liability was found established without any need to rely on *Bailey* Proposition C.

heightened by her pancreatitis no more assisted the hospital's case than if she had an egg shell skull.'

Three comments can be made about this passage. First, it is an indication that on the primary facts found, it was appropriate to draw an inference from those facts that but-for causation was established. This is not a wholly surprising conclusion. All it needs is a finding that the weakness from the pancreatitis alone was probably not sufficient to cause the aspiration and that at least some of the tortiously caused weakness was needed as well. Given that the aspiration took place on a particular day when both sources of weakness were found to be operative, such a finding does not seem especially 'robust'. Secondly, as has been recognised by commentators,⁹⁹ it is difficult to see how the thin skull rule, a principle that concerns remoteness of damage, has any relevance to establishing causation in fact. It is submitted that the reasoning in the previous comment provides a sufficient explanation of the position and does not rely on the thin skull rule. On Foskett J's approach, the facts of *Bailey* are similar to the facts of *Williams*. Accordingly, Lord Toulson's treatment of *Bailey* reinforces the argument that the decision in *Williams* itself involves an *application* of the but-for test. Thirdly, it is not clear whether the Privy Council is to be taken as having disapproved Waller LJ's Proposition C or was merely saying that it was an obiter dictum.

(d) Discussion

Lord Toulson did not expressly say in terms that the Privy Council was, or was not, applying the but-for test. There are indications both ways. On the one hand, given the reliance on the analogy with *Bonnington* as now analysed, it can be

⁹⁹ eg D Nolan and K Oliphant, *Lunney, Nolan and Oliphant, Tort Law* (Oxford: OUP, 6th edn, 2017) p 234. Steel and Stapleton, 'Causes and Contributions' (2016) 132 *LQR* 363, p 367, state that a similar principle can operate in the factual causation context, but that reference to the remoteness principle in the factual causation context 'may well muddy the waters'.

read as saying that on these facts the complications were caused by the *totality* of the sepsis, and that that was an *indivisible* cause of the harm. This carries the implication that the Privy Council was prepared to infer from the primary facts that the sepsis that resulted from the period of non-negligent delay was not alone sufficient to cause the complications.¹⁰⁰ Indeed, the Privy Council seems to regard the full awards of damages on the facts of *Bonnington*,¹⁰¹ *Bailey* and *Williams* as involving the application of 'trite law' in that in each case it was to be inferred that the defendant's negligence was a part cause of an indivisible injury. It inevitably follows that this approach will be applicable whether the causes are concurrent or successive.¹⁰² This would be consistent with Version 1 of 'material contribution'.¹⁰³

On the other hand, if that was the position, why express it in the language of a 'material contribution to a material contribution'? This has left open the possible interpretation that the privy Council was adopting Version 3 of 'material contribution'.¹⁰⁴ Ultimately, there are two possibilities. One is that the Privy Council was simply applying 'trite law' and drawing an inference, possibly 'robustly and pragmatically',¹⁰⁵ that but-for causation was established. This seems the more plausible interpretation. If that is not the case, then the analysis is

¹⁰⁰ Steel and Stapleton (n 99), p 366, assert that in *Bailey* 'it had not been established on the balance of probabilities that, absent [the negligent] contribution to her weakened state, she would have been able to deal with her vomit'. It is submitted that Lord Toulson simply took a different view on this point. Nolan and Oliphant (n 99), p 235, state that *Williams* cannot properly be interpreted as involving an application of the but-for test as the trial judge had refused to make such a finding. It is submitted, with respect, that this seems to overlook the point that an appellate court on an appeal is entitled to draw different inferences from the primary facts from those drawn by the trial judge: *Benmax v Austin Motor Co Ltd* [1955] A.C. 370 per Lord Reid at pp 375-376.

¹⁰¹ *Bonnington* was to be treated as an indivisible injury case as the divisibility point was not raised: see Lord Toulson at para [32]. It has been submitted above (nn 35-50) that it is properly to be regarded as a case of indivisible injury apart from the question whether damages should only have been awarded for the advancement of the disease.

¹⁰² Reliance on this distinction by counsel for the defendants rested on the assumption that *Bonnington* was a special *exceptional* rule applicable where the but-for test was not satisfied.

¹⁰³ See n 13.

¹⁰⁴ See n 17.

¹⁰⁵ The 'special conditions' mentioned by Benjamin Browne QC were not referred to and cannot be taken to have been either endorsed or rejected.

unfortunately opaque. Whichever position is right, it does not provide clear support for the existence of any exceptions to proving but-for causation.

5. HOW HAS *WILLIAMS* BEEN RECEIVED?

(a) Academic and professional commentary

Academic and professional commentary on *Williams* has seen a wide range of responses, which may be summarised as follows:

- (1) the decision is orthodox, involving application of the but-for test;¹⁰⁶
- (2) the decision is wrong, involving the improper application of 'material contribution' without involving establishment of but-for causation; the claim should have been rejected for failure to establish but-for causation; this is 'potentially disastrous for medical practitioners, their insurers and the NHS';¹⁰⁷
- (3) the decision is right, is based on application of *Bonnington*, involves modification of but-for causation, and the Privy Council rightly 'declined the invitation to turn back a decade of progress for patients' rights and safety';¹⁰⁸
- (4) the decision applied a version of 'material contribution' that appears to refer to 'a contribution to (ie a cause that affects , usually by worsening) a condition or state of affairs that *does* cause the damage complained of';¹⁰⁹
- (5) the decision should have involved application of a principle that, where D wrongfully contributes to a process by which an indivisible injury occurs,

¹⁰⁶ C Foster, 'A material contribution to forensic clarity' (2016) 166 NLJ 7689: "material contribution" is just one way of expressing true, "but-for" causation in certain sets of factual circumstances" (p 10). Cf M White, (2016) PILJ 11 (*Williams* approves *Bailey* but *Bailey* is based on but-for causation).

¹⁰⁷ S Green, [2016] PN 169.

¹⁰⁸ M Lyons, [2016] JPIL C75. The claims of 'progress' for patients is not borne out by the decided cases (see nn 78-86). Also welcoming is C Hobson, '*Williams v The Bermuda Hospitals Board*: pro-patient, but for ambiguities which remain' (2017) 25 Medical Law Review 126.

¹⁰⁹ J Plunkett, 'Causation in asbestos-related lung cancer claims' (2016), PN 158 p 162. This echoes Variant 3 of 'material contribution': n 17. Nolan and Oliphant (n 99) pp 234-235, state that a principle along these lines seems to be the best way of explaining the results in *Bailey* and *Williams*, but that it is difficult to discern such a principle from the reasoning in them.

causation in fact is established, but 'compensatory damages are not awarded if they would make the claimant better off than the claimant would have been absent wrongful conduct'.¹¹⁰

The argument in this paper is that, notwithstanding the difficulties in the reasoning, the significance of the decision in *Williams* should be taken at face value as involving an inference of fact that but-for causation was established; it only purports to apply what it regards as 'trite law'. The author shares the concerns inherent in (1), (2), (4) and (5) above that to award full damages in cases where but-for causation cannot be established needs proper justification and disagrees with the views in (2) and (3) that that is what *Williams* does as a matter of law. The question whether there is a 'material contribution' exception to proving but-for causation is crying out for review afresh by the Supreme Court. The accumulated dicta to date are unclear, inconsistent and unhelpful and proceed largely by assertion. Clarity is needed on the exact parameters of such an exception and on what are the reasons of legal policy that justify it.

(b) Post-*Williams* cases

Williams has been cited in a few cases, of which two are significant.

Heneghan

In *Heneghan v Manchester Dry Docks Ltd*,¹¹¹ H died from lung cancer caused by asbestos dust. Two points are of interest for our purposes. First, the court rejected on the facts an argument that each individual exposure to asbestos dust made a material contribution to the development of lung cancer. They confirmed that the development of cancer was *not* like the development of a cumulative disease such as pneumoconiosis or asbestosis. It was not legitimate to infer from epidemiological evidence that demonstrated that cumulative exposures increased

¹¹⁰ J. Stapleton and S. Steel 'Causes and contributions' (2016) 132 *LQR* 363. Accordingly, the award of damages in *Williams* was only supportable if but-for causation had been established.

¹¹¹ [2016] EWCA Civ 86.

the risk of harm that *each* exposure played a part in bringing that harm about.

The second point is this. Lord Dyson MR¹¹² said there were three ways of establishing causation in disease cases: (1) satisfying the but-for test; (2) 'when the disease is caused by the cumulative effect of an agency part of which is attributable to breach of duty on the part of the defendant and part of which involves no breach of duty, the defendant will be liable on the ground that his breach of duty made a "material contribution" to the disease: *Bonnington Castings*'; (3) the *Fairchild* exception. It is submitted that the wording of proposition (2) is actually consistent with the but-for test rather than inconsistent with it, even though it is presented separately. Furthermore, it is helpful in discouraging the notion that the 'material contribution' concept might be invoked without proper analysis to solve causation difficulties in disease cases *outside* the context of cumulative causes.

John

*John v Central Manchester and Manchester Children's University Hospitals NHS Foundation Trust*¹¹³ addressed issues arising from *Williams* directly.

The claimant, Dr Sido John, sought damages in respect of brain damage. There were three factors that led to this damage: (1) the effect of a fall; (2) negligent delay in transfer to a specialist hospital which caused 'an extended period of raised inter-cranial pressure'; and (3) a post-operative infection that was not the result of negligence. The claimants in argument accepted that 'the expert medical analysis did not permit a "but-for" assessment to be made'.¹¹⁴ (This must mean that it was accepted that it was equally possible that the non-tortious causes had been sufficient alone to cause the brain damage.) However, they argued that Dr John was entitled to full compensation, relying on *Bailey* and *Williams*. The defendants in argument accepted that their negligence had made a

¹¹² At para [23].

¹¹³ [2016] EWHC 407 (QB).

¹¹⁴ Para [82].

material contribution to the injury¹¹⁵ and that that was sufficient for liability,¹¹⁶ but argued that damages should be apportioned to reflect the extent of that contribution by comparison with the effect of the two non-tortious causes. Picken J held: (1) that there is a special 'material contribution' test to be derived from *Bonnington*; (2) that this was not confined to cases where there was a single agency (eg the dust in *Bonnington*; the overall weakness in *Bailey*; and the overall sepsis in *Williams*) but applied where there were different agents (here, the initial injury, the pressure and the post-operative infection); (3) that damages should not be apportioned in accordance with *Holtby*: first, it was doubtful whether apportionment was permitted where causation was established;¹¹⁷ secondly, it was *impossible* and not merely *difficult* (as in *Holtby*) to find a proper basis for apportionment; and 'if the evidence is such that it is not possible to attribute damage to a particular cause, the claimant must be entitled to recover in respect of the entirety of his or her loss.'¹¹⁸

This case takes the law beyond *Bonnington* and *Williams* and must therefore stand on its own authority. It asserts that there is a special rule. Point (2) was based first on the argument that Lord Reid in *Bonnington Castings* had regarded the material contribution principle as of general application. So he did, but for the reasons given above¹¹⁹ it is unsafe to assume that his reference to this term is to be equated with any special 'material contribution rule'; and no such special rule was in terms endorsed by *Williams*. A second reason was that Lord Bridge in *Wilsher*¹²⁰ (the source of the single causative agent principle as it limits *Fairchild*) had made it clear that that the outcome would have been different if the claimant

¹¹⁵ See paras [89],[92]. Counsel for the defendants seemed to accept that the tortious inter-cranial pressure had caused some brain damage.

¹¹⁶ It is submitted that this concession should not have been made, given the weakness of the authority to justify this position although it is consistent with the dictum in *Heneghan* cited above.

¹¹⁷ Version 4(1) of 'material contribution': see n 21.

¹¹⁸ Para [98]. Version 4(2) of 'material contribution': see n 21.

¹¹⁹ nn 8, 21-31.

¹²⁰ *Wilsher v Essex Area Health Authority* [1988] AC 1074, HL.

could have shown that the excess of oxygen had made a 'material contribution' to the blindness.¹²¹ This is a fair point. But it is undermined by the point that it is unclear whether Lord Bridge regarded 'material contribution' as a but-for exception. All it really shows is that *Wilsher* does not as a matter of precedent *require* the application of the single causal agent rule in a material contribution case. It needs to be addressed as a matter of legal policy whether the 'single causal agent' rule *should* be applied to any special 'material contribution' rule (as a but-for exception) in cumulative cause cases as it does in *Fairchild*. An argument that it should is that any special claimant-friendly principle should be drawn as narrowly as possible. An argument against is that the claimant in such a case will have proved D to have caused *some* damage to him or her, justifying invocation of a special rule,¹²² and that restriction to cases on single causal agent is to draw an arbitrary and unworkable line. For example, what counts as a 'single' causal agent may well depend on the generality of language used to describe causes, an inherently uncertain process.¹²³

As to point (3) in *John* it was simply asserted¹²⁴ that apportionment (sc by cause) was not available in a 'material contribution to damage' case. This is undeniably true where D's wrong ('material contribution' is a but-for cause of such an injury.¹²⁵ But *Barker v Corus UK Ltd*¹²⁶ remains good law for the principle that there should generally be apportionment where the material increase in risk but-for exception is applied.¹²⁷ Why this should not be applied where a different but-for exception is applied needs to be justified, not merely asserted. A yet further problem is that *Holtby*¹²⁸ stands for the proposition that, where apportionment is

¹²¹ Picken J cited Lord Bridge in *Wilsher* at pp 1081-1082.

¹²² See further n 133.

¹²³ For powerful criticism of the 'single agent' rule as it applies in *Fairchild* cases see K Wellington, 'Beyond single causative agents' (2013) 20 Torts LJ 208.

¹²⁴ Para [98].

¹²⁵ Cf n 51.

¹²⁶ [2006] UKHL 20, [2006] 2 AC 572.

¹²⁷ The Compensation Act 2006 s.3 reverses *Barker* only in cases of mesothelioma: *Heneghan*.

¹²⁸ nn 40-50..

appropriate, the risk of evidential uncertainty lies with the *claimant*. That follows from the points that the majority in that case required the claimant to prove 'that the defendant is responsible for the whole or a quantifiable part of his disability' and declined to place any legal or evidential burden on the defendant¹²⁹ In *John*, it was said that the court in *Holtby* was merely dealing with cases of evidential *difficulty* not *impossibility*.¹³⁰ It is difficult to see that that is an adequate basis for distinguishing *Holtby*. and indeed the outcome seems plainly inconsistent. Overall, *John* further illustrates the problem that the assumption that *Bonnington* establishes a special rule gets in the way of full debate of the relevant issues of legal policy.

6. CONCLUSION

In the light of *Williams* and the cases following it, it is possible to set out the following propositions.

(1) The expression 'material contribution' continues to be associated with a number of distinct ideas.¹³¹ It is,unhelpful to assume that there is a single 'material contribution rule'. Counsel and judges invoking 'material contribution' need to be clear which meaning is relied upon.

(2) The normal rule remains the but-for test. A 'material contribution' will commonly amount to a but-for cause. Examples include cases where a judge finds (robustly or otherwise) that the totality¹³² of a number of factors ('material contributions') operating cumulatively is necessary to cause a disease *Bonnington*, *Bailey* and *Williams* can be regarded as such cases..

¹²⁹ per Stuart-Smith LJ at para [20].

¹³⁰ Picken J at paras [99]-[100].

¹³¹ Six distinct variants have been identified: see nn 13, 16,18,92.

¹³² This is not of course necessary; it is enough that the judge is satisfied that the non-tortious factors are not sufficient alone to cause the damage.

(3) There is some support in the case law for a special 'material contribution' rule in cumulative cause cases that addresses some situations where there is evidential uncertainty: where C can show that D's wrong has been a but-for cause of some damage to C, then the risk of uncertainty as to the extent of that damage lies with D.¹³³ The view of the majority in *Holtby* on this point would need to be revisited. It will be necessary to pay close attention to the parameters of any such rule. So far, there are authorities that, on the one hand, deny a requirement that there be a single causal agent;¹³⁴ and, on the other, deny (by assertion) that any special rule applies to claims in negligence or nuisance between landowners.¹³⁵ A real problem with the rule is that it would appear give rise to the position that full damages would be awarded in a case where the evidence is not sufficiently precise to justify an apportionment, but it is reasonably clear that D's tortious contribution is relatively small. This is hard to justify, and does incentivise apportionment where at all possible.

(4) In any event, the existence or parameters of any special 'material contribution' rule needs to be considered afresh at the level of the appellate courts.

(5) *Bonnington Castings* and *Bailey* are to be regarded, on Lord Toulson's approach in *Williams*, as cases where but-for causation was established, in which case they are not overdetermination cases and are not safely to be cited on such matters. *Bailey* Proposition C is at best an obiter dictum. It may be that Version 3 of 'material contribution'¹³⁶ could be developed to address such cases. Whether that is the best approach is a separate matter and remains for another day.

¹³³ This is the position adopted by Clarke LJ (dissenting) in *Holtby* (n 40) paras [34]-[37] and Picken J in *John*. It is supported by Green (n 3), pp 95-96 but not Steel (n 3), pp 244-246).

¹³⁴ *John*.

¹³⁵ *Chetwynd*: n 74.

¹³⁶ n 16.

